ORIGINAL COPY

RECEIVED
FEB
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-5903

H___ L___, on behalf of herself and all others similarly situated,

Plaintiff and Appellant,

vs.

Honorable Scott M. Matheson, individually and in his capacity as Governor of the State of Utah, and Honorable Robert B. Hansen, individually and in his capacity as Attorney General of the State of Utah,

Defendants and Respondents.

On Appeal From the Supreme Court of the State of Utah

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT B. HANSEN
Attorney General
State of Utah

PAUL M. TINKER
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 533-5261

Counsel of Record
Attorneys for
Defendants-Respondents

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-5903

H___ L___, on behalf of herself and all others similarly situated,

Plaintiff and Appellant,

vs.

Honorable Scott M. Matheson, individually and in his capacity as Governor of the State of Utah, and Honorable Robert B. Hansen, individually and in his capacity as Attorney General of the State of Utah,

Defendants and Respondents.

On Appeal From the Supreme Court of the State of Utah

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents submit the following brief in opposition to the Petition for Writ of Certiorari on the ground that it is manifest that the statute in question does not infringe upon the right of privacy as guaranteed by the Fourteenth Amendment to the United States Constitution, nor does it violate any other right protected by the Constitution.

STATEMENT OF THE CASE

A. The Statute

The petition raises the question of the validity of Utah Code Annotated, Section 76-7-304(2)(1978).

This statute provides in pertinent part that "[T]o enable the physician to exercise his best medical judgment, he shall: * * * (2) Notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor." The statute provides for notification, if physically possible, of a minor's parents prior to her obtaining an abortion; no requirement of parental consent is contained in the statute.

B. The Proceedings Below

Petitioner, a fifteen year old girl, was informed by her physician that she was pregnant with an unwanted child. She determined to secure an abortion, but did not wish to inform her parents of her condition. Petitioner's physician allegedly would not perform the abortion without providing notice to her parents, because of Utah Code Annotated, Section 76-7-304(2)(1978).

The trial court concluded that the phrase "is possible", in Utah Code Annotated, Section 76-7-304(2)(1978), meant if physically possible and ruled that the statute, as thus interpreted did not violate the Constitution of the United States. The trial court's decision was appealed to the Supreme Court of Utah which unanimously affirmed the judgment of the trial court, declaring that the statute in question did not unconstitutionally restrict a minor's right of privacy as asserted by petitioner.

REASONS FOR DENYING THE WRIT

The Supreme Court of Utah unanimously found the notification requirement of Utah Code Annotated, Section 76-7-304(2)(1978), constitutional, in light of a careful analysis of the relevant case law. Petitioner has not cited cases from this Court dealing with the requirement of notification by the physician to the parents of the minor. All the decisions from this Court cited by petitioner address the abortion issue either in an adult context or in the context of a parental consent requirement. The only reference made in these cases to notification is in the context of notice of judicial proceedings. Bellotti v. Baird, ___ U.S. ___, 61 L.Ed.2d 797 (1979).

The requirement of notification in Utah Code Annotated, Section 76-6-304(2)(1978) is a very minimal requirement which does not violate any constitutional or other right of a minor. Notification does not act as an absolute roadblock to a minor's obtaining an abortion, since it does not require the consent or concurrence of the parents or guardian at any point in the decision-making process. Nothing in the Utah statute requires the parent's consent or anything more than an awareness of the proposed abortion. To leave the parent in total ignorance of the proposed major surgery upon a minor child still within the parents' control and custody would be to ignore totally and completely the fundamental notion of the integrity of the family unit and to disregard entirely the responsibility which parents have for their minor children. Also, the lack of parental involvement in, or at least awareness of, an abortion decision is fundamentally inconsistent

with the requirement of consent of the parent necessary in all other surgical operations on a minor, even granting the special nature of the right to make the ultimate abortion decision not subject to parental or governmental veto. Bonner v. Moran, 126 F.2d 121 (D.C. 1941). The Utah statute strikes an eminently fair balance between a minor and her parents by requiring only a minimal awareness, when possible, on the part of the parent and then leaving the further course of the decision-making process entirely in the hands of the individuals concerned. The Utah Supreme Court in its carefully reasoned decision took pains to illustrate why the Utah statute requiring mere notice does not run afoul the constitutional privacy right of minors as identified by this Court in Bellotti, supra, and in Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976).

A recent case which explores the dilemma of parental rights versus children's rights in the problematical context of the distribution of prescriptive contraceptive services and devices to unemancipated minors in the absence of notice to their parents, is Doe v. Irwin, 441 F.Supp. 1247 (W.D. Mich. 1977). In that case the court reviewed in great detail the law dealing with parental rights to control or influence the behavior of their minor children and held as follows:

> There are, then, three factors which combine here. First, the fact that parental privacy and religious beliefs are implicated. Sceond, the decisions undertaken here by minors who may lack to capacity to make decisions in this area (and who have had only brief consultation with state officials) are within the sphere of decisions which parents are uniquely positioned to evaluate from the standpoint of the

> maturity and capacity of their offspring and to provide the necessary guidance. Finally, and most importantly, these actions are carried out in an atmosphere of secrecy which fails to put parents on notice as to the state's actions relative to their children and has the practical result of depriving parents of alternatives to counteract such actions, if they so desire. Any one of these factors may be significant enough to support the result which this court has reached. The combination of such factors, however, is so serious that I conclude that the parental rights asserted here are seriously invaded by the actions of the defendant Center, taken under color of state law.
>
> Defendants continue to argue that minors have a fundamental constitutional right to obtain contraceptives and that such right would be unduly burdened by a requirement of notification of, and the opportunity for consultation with, the parents of such minors. As I have previously stated, even if there is a fundamental civil right among minors to obtain prescriptive contraceptives, that right need not exist to the total exclusion of any rights of the child's parents. Irwin, supra at 1253-54.

Although the subject of the Irwin case was the availability of contraceptives rather than abortions, the nature of the asserted requirement was identical — notice to the parents prior to the providing of services. The reasoning and case law in the Irwin decision can be applied in toto to the instant case. To assert that the state cannot require notification is to assert that the family relationship between parent and minor child is meaningless.

Additionally this Court itself recently dealt with the fundamental nature of the family relationship and the broad dimensions of parental authority over children, which while not absolute, is far-reaching. This analysis came in the case of Parham v. J.L., ___ U.S. ___, 61 L.Ed2d 101 (1979)(dealing with

involuntary hospitalization of juveniles) in which the Court made the following salient observations, at 118-120:

> Our jurisprudence historically has reflected Western Civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations." Pierce v. Society of Sisters, 268 U.S. 510, 535, 69 L.Ed. 1070, 45 S.Ct. 571, 39 ALR 468 (1925). See also Wisconsin v. Yoder, 406 U.S. 205, 213, 32 L.Ed.2d 15, 92 S.Ct. 1526 (1972); Prince v. Massachusetts, 321 U.S. 158, 166, 88 L.Ed. 645, 64 S.Ct. 438 (1944); Meyer v. Nebraska, 262 U.S. 390, 400, 67 L.Ed. 1042, 43 S.Ct. 625, 29 ALR 1446 (1923). Surely, this includes a "high duty" to recognize symptoms of illness and to seek and follow medical advice. The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. 1 W. Blackstone, Commentaries *447; 2 Kent, Commentaries on American Law *190.
>
> As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attests to this. That some parents "may at times be acting against the interests of their child" as was stated in Bartley v. Kremens, 402 F.Supp. 1039, 1047-1048 (E.D. Pa. 1975), vacated, 431 U.S. 119, 52 L.Ed.2d 184, 97 S.Ct. 1709 (1977), creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests. See Rolfe & MacClintock 348-349. The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition.

* * *

Moreover, the Court recently declared unconstitutional a state statute that granted parents an absolute veto over a minor child's decision to have an abortion. Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 49 L.Ed.2d 788, 96 S.Ct. 2831 (1976). Appellees urge that these precedents limiting the traditional rights of parents, if viewed in the context of the liberty interest of the child and the likelihood of parental abuse, require us to hold that the parents' decision to have a child admitted to a mental hospital must be subjected to an exacting constitutional scrutiny, including a formal, adversary, pre-admission hearing.

Appellees' argument, however, sweeps too broadly. Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state. The same characterizations can be made for a tonsillectomy, appendectomy or other medical procedure. Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments.

* * *

Appellees place particular reliance on Planned Parenthood, arguing that its holding indicates how little deference to parents is appropriate when the child is exercising a constitutional right. The basic situation in that case, however, was very different; Planned Parenthood involved an absolute parental veto over the child's ability to obtain an abortion. Parents in Georgia in no sense have an absolute right to commit their children to state mental hospitals; the statute requires the superintendent of each regional hospital to exercise independent judgment as to the child's need for confinement. See P. ____, 61 L.Ed.2d 111, supra.

Likewise in the present case there is no possibility of an absolute parental veto of a child's decision to exercise a fundamental right. There is no possibility of a veto at all. The only result of the Utah statute is the protection of family integrity by precluding a minor in most cases from exercising in total secrecy her constitutionally protected right to choose on abortion.

CONCLUSION

Respondent respectfully submits that it is manifest that the statute in question does not infringe upon the Fourteenth Amendment's guarantee of the right to privacy, and Respondent respectfully urges the court to deny the Petition for Writ of Certiorari.

Dated this 4th day of February, 1980.

RESPECTFULLY SUBMITTED

ROBERT B. HANSEN
Attorney General
State of Utah

Paul M. Tinker

PAUL M. TINKER
Assistant Attorney General